Supreme Court, U.S.
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CASE NUMBER _____

9th Circuit # 94-35901

IN THE SUPREME COURT OF THE UNITED STATES
1995-96 Term

William Ray Smith, Petitioner

v.

CAROLYN LEONARD, PAUL HOGGATT,
UNITED STATES OF AMERICA, RESPONDENTS

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1) Whether I, Petitioner William Ray Smith, engaged in a revenue taxable activity regulated by 26 USC when selling My timber at fair market value for American Eagle Gold Coins at their face value.

2) Whether My rights, protected by Amendments IV and V to the United States Constitution, against unreasonable seizure and to due process were violated as a result of Internal Revenue Service assessment of income tax on My American Eagle Gold Coins and their proceeding with collection by levy, lein, and seizure of My right, title and interest in property prior to a hearing to determine My taxpayer status.

3) Whether the taxation of American Eagle Gold Coins by the Internal Revenue Service constitutes a direct tax without apportionment in violation of Article I, Section 2, Paragraph 3 and Article I, Section 8, Paragraph 5 of the United States Constitution.

4) Whether the Internal Revenue Service, for income taxing purposes, has statutory authority to regulate the value of American Eagle Gold Coins to a greater value than that set by Congress.

5) Whether the Anti-Injunction Act, 26 USC § 7421, and the Declaratory Judgment Act, 28 USC § 2201(a) apply in suits brought by nontaxpayers.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I, William Ray Smith, hereby petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Court of Appeals' MEMORANDUM (APP 2) affirming the decision of the United States District Court for the District of Oregon was entered on July 3, 1995. It was not published. Petition for Rehearing *en banc* was timely filed, but was denied by ORDER (APP 1) on August 25, 1995.

The FINDINGS AND RECOMMENDATION (APP 5) dated July 9, 1994 of the United States District Court from which appeal was taken to the Court of Appeals was not published. ORDER (APP 4) dated August 31, 1994. JUDGMENT (APP 3) dismissing the case out of the District Court was filed September 8, 1994.

## BASIS FOR JURISDICTION

Date of JUDGMENT to be reviewed (contained in Memorandum) - July 3, 1995. Date of ORDER denying Petition For Rehearing - Aug. 25, 1995

Statutory provision conferring on this Court to review on a writ of certiorari the judgment in question is Title 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. Constitution For The United States:

Article I, Section 2, Paragraph 3 - Representatives and direct Taxes shall be apportioned among the several States...

Article I, Section 8, Paragraph 5 - The Congress shall have the Power To coin Money, [&] regulate the Value thereof,...

Article I, Section 9, Paragraph 4 - No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

Amendment IV - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

Amendment V - No person shall be... deprived of life, liberty, or property, without due process of law;...

Amendment XVI - The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

2. Statutes:

26 U.S.C. § 83 - If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of - (1) the fair market value of such property, . . . over (2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services . . .

26 U.S.C. § 7421 - Anti-Injunction Act, ...no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person...

28 U.S.C. § 2201(a) - Declaratory Judgment Act ...in a case of a actual controversy within its jurisdiction, except with respect to federal taxes other than actions brought under Section 7428 ...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

31 U.S.C. 5112(a) Sec. 2. (a) - (Public Law 99-185, Gold Bullion Coin Act of 1985) (in part) - (7) A fifty dollar gold coin...contains one troy ounce of fine gold. (8) A twenty-five dollar gold coin...contains one-half troy ounce of fine gold. (APP 6)

3. Regulations:

27 C.F.R. Ch. 1 § 250.11 (definitions) -

*Revenue Agent.* Any duly authorized Commonwealth Internal Revenue Agent of the Department of the Treasury of Puerto Rico.

*Secretary.* The Secretary of the Treasury of Puerto Rico.

*Secretary or his delegate.* The Secretary or any officer or employee of the Department of the Treasury of Puerto Rico duly authorized by the Secretary to perform the function mentioned or described in this part.

## STATEMENT OF THE CASE

In 1990, I transferred approximately 59,000 board feet of logs for 39 1-ounce American Eagle Gold Coins face value fifty dollars each; and, in 1991 I transferred approximately 47,000 board feet of logs for 29 1-ounce American Eagle Gold Coins face value fifty dollars each and 1 1/2-ounce American Eagle Gold Coin face value twenty-five dollars.

I did not file tax returns for tax years 1990 and 1991.

The Internal Revenue Service did an audit report and then prepared a Substitute For A Return in My name using third party source figures.

IRS Agent Paul Hoggatt (original defendant), Medford, OR, begins line 1. A. of his Income Tax Examination Changes with Timber Sales Income.

July 30, 1993 IRS District Director Carolyn Leonard (original defendant), Portland, Oregon, sent a NOTICE OF DEFICIENCY based upon the information supplied by Hoggatt.

Believing Tax Court is for taxpayers, I did not petition the Tax Court for a redetermination of the deficiency, but instead tried to resolve the problem by letter. The IRS never responded to any of My letters, but moved forward with their collection activities.

November 19, 1993 I filed the original case (Case No. 93 CV 3679 CC) in the Circuit Court for Douglas County State of Oregon naming Paul Hoggatt and Carolyn Leonard Defendants in their individual capacity.

I asked the Oregon State Circuit Court for a Declaratory Judgment pursuant to ORS 28.010. and 28.020 and Injunctive Relief based upon such judgment: declaring that for income taxing purposes, I,

William R. Smith, have not engaged in any taxable activity and am not subject to the payment of an income tax or penalties for the years 1990 and 1991: declaring that for income taxing purposes, I have not been self-employed and am not subject to payment of self-employment tax and penalties for the years 1990 and 1991; for a further order of the court, enjoining and restraining the Defendants from assessing or threatening to assess tax and penalties on My property from this date forward from sources that are not revenue taxable.

December 15, 1993 My case was removed from the Circuit Court to the United States District Court for the District of Oregon in Eugene with the United States being substituted as the PROPER PARTY-DEFENDANT

February 17, 1994 Defendant filed MOTION TO DISMISS FOR LACK OF JURISDICTION. Saying the court lacked subject matter jurisdiction because I was "seeking an abstract declaration that he is (I am) a "non-taxpayer". (And) (t)his claim is barred by the Declaratory Judgment Act, 28 U.S.C. 2201."

March 1, 1994 I responded with fact and law as to My position as a NONTAXPAYER and why My case should not be dismissed, but remanded back to the Douglas County Circuit Court if the United States District Court did not have jurisdiction to hear My issues.

My case was dismissed by the US District Court. I appealed to the 9th Circuit Court of Appeals. The appeals court adopted the district court's Findings and Recommendations and dismissed My case.

I have had no judicial hearing to determined My status. One Revenue Agent, Paul Hoggatt, has been allowed to declare me a taxpayer, with the results that oth-

er revenue personnel have assessed, levied and leined (and now seized) My property for the payment of income tax.

All appearances in the lower courts have been by paper only.

Defendants' alleged jurisdiction in the United States District Court f r the District of Oregon was pursuant to 28 U.S.C. § 1441(a). I objected to Defendents' moving My case from State Court to Federal Court. This was one of My questions on appeal to the 9th Circuit Court of Appeals.

## ARGUMENT AMPLIFYING REASONS FOR WRIT

1. The 9th Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. The 9th Circuit Court of Appeals has taken a position in opposition to Congress.

3. The Questions presented are of importance in the administration of the federal tax laws.

4. The heart of this issue is personal property rights which this Court needs to give direction to once again.

### Question #1

Whether I, Petitioner William Ray Smith, engaged in a revenue taxable activity regulated by 26 USC when selling My timber at fair market value for American Eagle Gold Coins at their face value.

The decision rendered by the Sims court is still valid and relevant:

> "Timber and minerals attached to the soil are individual property, as much so as anything else, and the business of severing for commercial purposes is a lawful business, of the pursuit of which no individual can be deprived. Therefore it falls within the restriction found in the Constitution." Sims v. Ahrens, 271 SW 721, 724 (1925)

This court in its landmark decision of Miranda leaves no doubt, neither the State Government nor the Federal Government can abrogate My natural rights:

> "Where rights secured by Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 86 S.Ct. 1602 (1966)

I have a natural right to sell My timber in exchange for American Gold Eagle Coins at their face value.

But, the IRS believes otherwise and they are in the process of abrogating My natural rights by their collection activity. It is time once more for this court to enforce the law as intended by Congress and prevent the IRS from continuing their adverse actions against Me.

Question #2

Whether My rights, protected by Amendments IV and V to the United States Constitution, against unreasonable seizure and to due process were violated as a result of Internal Revenue Service assessment of income tax on My American Eagle Gold Coins and their proceeding with collection by levy, lein, and sei-

zure of My right, title and interest in property prior to a hearing to determine My taxpayer status.

When I filed the original law suit in state court I asked for a determination as to My taxpayer status in the form of a Show Cause Hearing. To this date I have not had a hearing.

Respondent has no jurisdiction to assess taxes on My property prior to a judicial review to determine My status as a taxpayer. This is due process of which I cannot be deprived. Botta makes it quite plain by saying:

> "(A) reasonable construction of the taxing statutes does not include vesting any tax official with absolute power of assessment against individuals not specified in the statutes as persons liable for the tax without an opportunity for judicial review of this status before appellation of "taxpayer" is bestowed upon them and their property is seized and sold. Botta v. Scanlon, 288 F.2d 504, 508 (2nd Cir. 1961).

Paul Hoggatt, Revenue Agent, Medford, Oregon initiated the chain of events by assigning Me a Taxpayer Identification Number then preparing a *Substitute For A Return* followed by an audit report in My name. By so doing he bestowed the appellation of "taxpayer" upon Me without an opportunity for judicial review of this status.

The IRS has now served Me with **Notice of Seizure** which is the last step before sale of My property. In spite of

the controlling law and facts of this case, My rights are being abrogated by the unchecked actions of the Internal Revenue Service which violate My rights secured by Amendments IV and V.

Question #3

Whether the taxation of American Eagle Gold Coins by the Internal Revenue Service constitutes a direct tax without apportionment in violation of Article I, Section 2, Paragraph 3 and Article I, Section 9, Paragraph 4 of the United States Constitution.

The Brushaber case tells Me that income taxes are an excise tax and entitled to be enforced as such:

> "(T)he conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such...." Brushaber v. Union Pacific R.R. Co., 240 U.S. 16-17 (1916).

Brushaber has not been overturned, yet the Internal Revenue Service is boldly going forward with their collection activity by levying a direct tax on My property. The selling of timber is not a privileged or franchised activity for which the Internal Revenue Service can assess an income tax (excise tax). It is a natural right for which I can not be taxed. Sims, supra.

So important was the subject of direct taxes without apportionment that Congress thought it necessary to include the prohibition twice in the Constitution, once in the affirmative at Article I, Section 2, Paragraph 3, "Representatives and direct Taxes shall be apportioned among the several States..." then again in the negative at Article I, Section 9, Paragraph 4, "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken." Nonetheless, the Internal Revenue Service is treating My receipts as income and in so doing are levying a direct tax that is not apportioned which is contrary to these two Articles of the United States Constitution.

I am not a corporation, I am an individual and Redfield also says that I have natural rights to live and own property for which an excise tax cannot be imposed:

> "The individual, unlike the corporation, cannot be taxed for the mere privilege of existing. The corporation is an artificial entity which owes its existence and charter powers to the state; but the individuals' rights to live and own property are natural rights for the enjoyment of which an excise cannot be imposed." Redfield v. Fisher, 292 P. 813, 819 (1930).

Excise taxes are indirect taxes. This is reinforced and made quite clear by Flint:

> "We must remember, too, that the revenues of the United States

must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government." Flint v. Stone Tracy Co., 220 U.S. 107, 154 (1911).

and, "Conceding the power of Congress to tax the business activities of private corporations ... the tax must be measured by some standard...." Flint, supra, 165.

and, "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income...." Flint, supra, 165.

and, "Excises are "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges"....The tax under consideration ... may be described as an excise upon the particular privilege of doing business in a corporate capacity,..." Flint, supra.

and, "...the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable." Flint, supra.

Again, I have not engaged in any privileged or franchised activity. I have not done business in the manner described in the statute (26 USC) and no tax is payable.

Tyler reinforces this fact when it says:

> "A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax...." Tyler v. U.S., 281 U.S. 497, 502 (1930). (Emphasis added)

The income tax is an excise tax as decided by this court many times. However, the Internal Revenue Service is taxing the tangible fruits in My case which changes the income tax from an indirect tax to a direct tax without apportionment.

Murdock also tells me that a Federal Income Tax, being an excise tax, cannot be imposed on My constitutionally guaranteed rights. Such rights are not licensed nor are they privileged. If the Federal Government could charge (tax) those rights, so could the State Government, however:

> "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943).

Amendment XVI reads, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Again, looking at Brushaber I find that Amendment XVI deals

with indirect/excise taxes, not with direct taxes on income:

> "(T)he contention that the (16th) Amendment treats a tax on income as a direct tax ... is ... wholly without foundation...." Brushaber, supra, 1, 18. (Emphasis added)

This is substantiated in Stanton which says:

> "(T)he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged...." Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

An income tax laid directly upon My receipts is a direct tax and is not authorized by Amendment XVI. As stated earlier, income taxes are indirect/excise taxes laid upon the happening of an event that is a privilege or franchise.

Economy Plumbing and Heating leaves no doubt that Congress knew all persons are not taxpayers. There are certain requisites that a person has to possess before the title of "taxpayer" can adhere:

> "The revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not to nontaxpayers. The latter are without their scope. No procedure is prescribed for non-

taxpayers, and no attempt is made to annul any of their rights and remedies in due course of law. With them Congress does not assume to deal, and they are neither of the subject nor of the object of the revenue laws." Long v. Rasmussen, 281 F. 236, 238. (1922); Economy Plumbing and Heating v. U.S., 470 F 2d 585, 589. (1972)

Note 3 of this case reads as follows:

"3. The term "taxpayer" in this opinion is used in the strict or narrow sense contemplated by the Internal Revenue Code and means a person who pays, overpays, or is subject to pay his own personal income tax. (See Section 7701(a)(14) of the Internal Revenue Code of 1954.) A "nontaxpayer" is a person who does not possess the foregoing requisites of a taxpayer." Economy, supra, nt. 3, at 590.

I do not possess the requisites of a taxpayer as contemplated by Congress when they wrote the Internal Revenue Code. I do not pay, overpay, nor am I subject to pay My own personal income tax. I am a "nontaxpayer". I am neither the subject nor the object of the revenue laws as I am outside their scope.

There is no question, I have not paid and I have not overpaid personal income tax, so those two requisites do not qualify Me as a "taxpayer". The question remaining is 'Am I subject to pay My own personal income tax?' and the answer is "No!". In order for Me to be subject to pay income tax I have to en-

gage in a revenue taxable activity (privilege or franchise) and I have not done this.

This position is proven by Congress in the House Congressional Record when they say that the income is not the subject of the tax, but the activity that produces it is the subject of the tax:

> "The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax: it is the basis for determining the amount of tax." House Congressional Record, March 27, 1943, page 2580.

The Conner case defines income several different ways all meaning the same thing:

> "There must be *gain* before there is income within the meaning of the sixteenth amendment."
>
> "The meaning of income in its everyday sense is a *gain* or recurrent benefit usually measured in money that derives from capital or labor."
>
> "Income is nothing more nor less than realized *gain*. It is not synonymous with receipts."
>
> "Whatever may constitute income, therefore, must have the essential feature of *gain* to the recipient."
>
> "Congress has taxed income, not compensation." Conner v. United States, 303 F. Supp. 1187 (1969) (US

District Court, S.D. Texas, Houston Division)

Ballard reaffirms the House Congressional Record and Conner by stating:

> "Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. ... Income may be defined as the gain derived from capital, from labor, or from both combined." United States v. Ballard, 535 F.2d 40 (1976).

26 U.S.C. Section 83 defines income this way: "If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of- (1) the fair market value of such property...over (2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services..."

I traded My property (trees) for property (American Eagle Gold Coins, face value fifty dollars each). In 1990 I received 39 American Eagle Gold Coins and in 1991 I received 29.5 American Eagle Gold Coins that as a matter of law has a value of $3,425.00. (APP 7)

I did not receive more than the fair market value for My trees. Accordingly, I did not have income even by this defi-

nition. I had an equal exchange of property which is not a taxable event.

Question #4

Whether the Internal Revenue Service, for income taxing purposes, has statutory authority to regulate the value of American Eagle Gold Coins to a greater value than that set by Congress.

The United States Constitution Article 1, Section 8, Paragraph 5 says, "Congress shall have power to coin money [and] regulate the value thereof,..."

The Internal Revenue Service knows I received the American Eagle Gold Coins in exchange for my timber. However, in total disregard for this, they decided to regulate the value of the coins that Congress minted and made the tax assessment based on this changed value from $50.00 each in 1990 to approximately $1,137.00 each. Then in 1991 they re-regulated the coins again, this time from $50.00 each to approximately $413.76.

Only Congress has the power to regulate the value of the coin they issue. The Internal Revenue Service usurped that power by changing the value of the American Eagle Gold Coins when they made the tax assessment against Me. In so doing they have acted outside the scope of their office and have committed fraud.

The terms *revenue agent*, *secretary*, and *secretary or his delegate* are not defined in 26 CFR which are the implementing regulations for the income tax of 26 USC 61, the income tax for which I am being held liable.

And, *revenue agent* as defined by 27 C.F.R. Ch. 1 § 250.11 is, "Any duly authorized Commonwealth Internal Revenue Agent of the Department of the Treasury of Puerto Rico." Likewise, the *Secretary* is the "Secretary of the Treasury of Puerto Rico and *his delegate* means the Secretary or any officer or employee of the Department of the Treasury of Puerto Rico duly authorized by the Secretary to perform the function mentioned or described in this part."

*This part* refered to in the above paragraph means 27 C.F.R. which regulates those who deal in alcohol, tobacco and/or firearms. I am not sure exactly where Puerto Rico fits into the scheme. I only know I do not deal in alcohol, tobacco and/or firearms and I do not live in Puerto Rico. Hence, the IRS has no jurisdiction to lay a tax on Me or My property.

First, because the IRS has no authority to regulate the value of the American Eagle Gold Coins I received in compensation for My timber to a greater value than that set by Congress. And secondly, Paul Hoggatt and Carolyn Leonard (original defendants) are *revenue agents* of the Department of the Treasury of Puerto Rico not of the United States, therefore, they have no authority to impose the income tax on me.

Question #5

Whether the Anti-Injunction Act, 26 USC § 7421, and the Declaratory Judgment Act, 28 USC § 2201(a) apply in suits brought by nontaxpayers.

The Anti-Injunction Act, 26 USC § 7421, applies to suits for the purpose of

restraining the assessment or collection of lawfully owed taxes, unless of course the Internal Revenue Service is in the business of assessing and collecting taxes which are not lawfully owed (and this appears to be the case in regards to Me). But, it was not the intention of Congress. The Code applies to taxpayers not to nontaxpayers according to Economy, supra. and Long v. Rasmussen, supra. The lower courts did not make sufficient conclusions of law or findings of fact that I am a taxpayer. Thus, I have the right, by this court action, to bar the IRS from assessment and collection or threatening to assess and collect tax and penalties from Me.

Like the Anti-Injunction Act, the Declaratory Judgment Act, 28 USC § 2201 (a), applies to taxpayers not to nontaxpayers. Again, the lower courts did not make sufficient conclusions of law or findings of fact that I am a taxpayer. Such law or facts are essential in order for my action to be barred by the Declaratory Judgment Act. I do not meet the requisites of a taxpayer per Economy, supra. and 26 USC 83. I have not paid, I have not overpaid and I am not subject to pay My own personal income tax. This is well established in the arguments above. The IRS cannot prove otherwise. There are no federal taxes for which I am subject (liable), thus, this court can declare my status as a nontaxpayer which includes for income tax purposes that I have not engaged in any taxable activity and I am not subject to the payment of income taxes or penalties for 1990 and 1991.

## CONCLUSION

Everything hinges on My status. The law and facts as set out above show that I am a nontaxpayer and the Internal Revenue Service has no jurisdiction to enforce the Code against me. As a result, the 9th Circuit Court of Appeals has decided important questions of federal law in a way that conflicts with relevant decisions of this Court. To be specific, the appeals court, by dismissing My case, has decided that I am a taxpayer, My business is privileged or franchised and My receipts (property - American Eagle Gold Coins) therefrom were income and taxable by the Internal Revenue Service without apportionment. These decisions were made without a hearing to determine taxpayer status in violation of my right to due process.

I cannot summarize My argument better that the following paragraph taken from Conner (supra): "Whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the sixteenth amendment became effective, it was true at the time of the decision of Eisner v. McComber, 252 U.S. 189 (1919), it was true under section 22(a) of the Internal Revenue Code of 1939, and it is likewise true under section 61(a) of the Internal Revenue Code of 1954. If there is no gain, there is no income."

For the foregoing reasons, I respectfully pray that a Writ should issue to reverse the Judgment and Opinion of the United States Court of Appeals for the 9th Circuit.

Respectfully submitted this 17th day of November, 1995.

William Ray Smith sui juris

William Ray Smith, sui juris
Petitioner as himself
c/o 4479 Corn Creek Road
Days Creek, Oregon state
(PZ 97429)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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William R. Smith, Appellant

94-35901
D.C. No. CV-93-06412-MRH
v. Oregon (Medford)

ORDER

CAROLYN LEONARD, PAUL HOGGATT,
UNITED STATES OF AMERICA, APPELLEES.

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Filed August 25, 1995

Before: O'SCANNLAIN, LEAVY, and HAWKINS,
Circuit Judges.

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The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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William R. Smith, Appellant

No. 94-35901
D.C. No. CV 093-06412-MRH

v.

MEMORANDUM[1]

CAROLYN LEONARD, PAUL HOGGATT,
UNITED STATES OF AMERICA, APPELLEES.

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Appeal from the United States District
Court for the District of Oregon
The Honorable Michael R. Hogan

Submitted June 26, 1995[2]
Filed July 3, 1995

Before: O'SCANNLAIN, LEAVY and HAWKINS,
Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellant's request for oral argument is denied.

William R. Smith appeals pro se the district court's dismissal of his action seeking declaratory relief regarding his claimed nontaxpayer status under the Internal Revenue laws and injunctive relief regarding the assessment and collection of federal income taxes for tax years 1990 and 1991. Smith contends the district court erred by removing the action from state to federal court, substituting the United States as a defendant, and dismissing the action. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Smith contends the district court erred by removing the action from state to federal court pursuant to 28 U.S.C. § 1441(a). This contention lacks merit because a federal question was presented on the face of the complaint. See Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401, 1406 (9th Cir. 1991), cert. denied, 113 S. Ct. 2927 (1993).

Smith contends the district court erred by substituting the United States as a defendant in place of Internal Revenue Service (IRS) employees Carolyn Leonard and Paul Hoggatt, because Leonard and Hoggatt acted outside the scope of their employment when they sent Smith a notice of deficiency for 1990 and 1991. This contention lacks merit because the essential effect of the declaratory and injunctive relief sought would be against the United States. See Shermoin v. United States, 982 F.@d 1312, 1320 (9th Cir. 1992), cert. denied, 113 S. Ct. 2993 (1993).

Finally, Smith contends the district court erred by dismissing his action for failure to state a claim. Smith sought (1) a declaration that he is not a taxpayer and (2) an injunction against assessment and collection of federal income taxes. He claimed that his lumber sales were not taxable activity because he did not receive compensation in excess of the fair market value of the lumber. The district court correctly determined that the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, 26 U.S.C. § 7421(a), barred Smith's claims. See Hughes v. United States, 953 F.2d 531, 535-37 (9th Cir. 1992) (federal courts lack jurisdiction to grant declaratory relief with respect to tax or to enjoin assessment or collection of tax).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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William R. Smith,

Plaintiff,

v. Civil No. 93-6412-CO

CAROLYN LEONARD, et al., **JUDGMENT**

Defendants.

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Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed.

DATED this 8th day of September, 1994.

DONALD M. CINNAMOND
CLERK, U.S. DISTRICT COURT

/s/
by Craig W. Meyer, Deputy Clerk

Entered on Docket 9/8/94

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

---

William R. Smith,

Plaintiff,

v. Civil No. 93-6412-CO

CAROLYN LEONARD, District Director, in her individual capacity, and PAUL HOGGATT, Revenue Agent, in his individual capacity,

Defendants.

ORDER

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Magistrate Judge John P. Cooney filed Findings and Recommendation on July 19, 1994, in the above entitled case. The matter is now before me pursuant to 18 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636 (b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313, (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given de novo review of Magistrate Judge Cooney's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Cooney's Findings and Recommendation filed July 19, 1994, in its entirety. Plaintiff's motion to quash removal (#7), motion to quash substitution (#8), and motion to set aside the court's order (#11) are denied. Plaintiff's motions for an order to show cause (#9) and for a stay of any further collection proceedings (#36) are denied as moot. Defendant United States' motion to dismiss (#20) is granted.

IT IS SO ORDERED.

DATED this 31st day of August, 1994.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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William R. Smith,

Plaintiff,

v. Civil No. 93-6412-CO

CAROLYN LEONARD, District Director, in her individual capacity, and PAUL HOGGATT, Revenue Agent, in his individual capacity,

**FINDINGS AND RECOMMENDATION**

Defendants.

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William R. Smith
4479 Corn Creek Road
Days Creek, Oregon 97429

PRO SE PLAINTIFF

Jack C. Wong, United States Attorney
888 S.W. Fifth Avenue, Suite 1000
Portland, Oregon 97204

Barbara A. Johnson
Attorney at Law
P.O. Box 683
Washington, D.C. 20044

ATTORNEYS FOR DEFENDANTS

COONEY, Magistrate Judge:

Plaintiff originally filed a complaint, in state court, against individually maned Internal Revenue Services employees for declaratory judgment, injunctive relief, and money damages based on claimed statutory and constitutional violations arising from an allegedly wrongful notice of deficiency. Defendant removed this action to federal court. This court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiff moves to quash removal to federal court (#7), to quash substitution of the United States as Defendant (#8), for an order to show cause (#9), to set aside the court's order allowing the United States to be substituted as Defendant (#11), and for a stay of any further collection proceedings (#36). Defendant moves to dismiss the complaint (#20). Based on the following, Plaintiff's motion to quash removal (#7), motion to quash substitution (#8) and motion to set aside the court's order (#11) should be denied. Plaintiff's motions for an order to show cause (#9) and for stay of any further collection proceedings (#36) should be denied as moot. Defendant's motion to dismiss (#20) should be granted.

## I. FACTUAL BACKGROUND

In making the following statement of facts all material allegations in Plaintiff's pleadings are taken as true.

Plaintiff was issued a notice of deficiency by the Internal Revenue Service. Plaintiff alleges Defendants

Carolyn Leonard and Paul Hoggatt are Internal Revenue Service employees, who "have under color of law and abuse of authority" violated the United States and Oregon Constitutions and the Internal Revenue Code "by threatening to assess a direct tax and penalties upon my property". (Plaintiff's Complaint at 2-3). Plaintiff alleges that Defendants "sent bootleg forms to me" and Defendant Hoggatt "prepared an unauthorized substitute return for me." (Id. at 4). Plaintiff also alleges that all the actions "complained of are done individually outside Defendants scope of employment as IRS officers."

Plaintiff claims: he is not a taxpayer as defined by Internal Revenue Code; he does not have taxable income; he was not self-employed; he is not subject to a taxable year; he did not request, and does not want a taxpayer identification number; the activities he engaged in are not taxable; and the Internal Revenue Code penalties are not applicable to him. Plaintiff alleges that his claim is "a civil action for declaratory and injunctive relief and money damages, arising under Article 1, Section 2, Paragraph 3 and Article 1 Section 9, Paragraph 4 of the Constitution of the United States[1] and

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[1] Article 1, Section 2, clause 3 of the United States Constitution provides in part"Representatives and direct Taxes shall be apportioned among several States...". As noted in the text, this clause is set off in brackets and has been amended by the Sixteenth Amendment. The Sixteenth Amendment provides "The

Article IV, Paragraph 32 of the Constitution of the State of Oregon." (Id. at 2).[2]

He seeks a judgment from the court declaring that; for income tax purposes he has not engaged in any taxable activity; he is not subject to the payment of income taxes or penalties for 1990 or 1991; he has not been self-

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Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Articled 1, Section 9, clause 4 provides "No Capitation, or other direct, Tax shall be laid, unless Proportion to the Census or Enumeration herein before directed to be taken. Again a footnote points out that this clause has been affected by the Sixteenth Amendment.

Article 1, Section 8, clause 1 provides in part "The Congress shall have the Power To lay and collect Taxes, Duties, Imports and Excises...".

[2] Article IV, paragraph 32 of the Oregon Constitution provides in part "Notwithstanding any other provision of this Constitution, the Legislative Assembly, in any law imposing a tax or taxes on, in respect to or measured by income, may define the income on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provisions."

employed; and he is not subject to self-employment tax or penalties. (Id. at 5). He seeks injunctive relief enjoining the assessment and collection of federal income taxes and penalties, and reasonable fees, costs and disbursement from this suit. (Id.). In the alternative, Plaintiff seeks an order that the Defendant "tell me the taxable activity I engaged in or in the alternative the statute which makes me liable giving them jurisdiction to assess direct tax and penalties on my property for the years 1990 and 1991." (Id.).

## II. DISCUSSION

### Removal Jurisdiction

On December 15, 1993, pursuant to 28 U.S.C. §§ 1441 and 1446, this action was removed to federal court. Plaintiff moves to quash removal of this action to federal court (#7).

28 U.S.C. § 1441(a) provided that a Defendant may remove an action from state court to federal court in any civil action over which the district court would have original jurisdiction. 28 U.S.C. § 1441(a); Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368, 1371 (9th Cir. 1987). 28 U.S.C. § 1331 confers original jurisdiction to the district court over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331; First Affiliated, 813 F.2d at 1371.

A case arises under federal law, within the meaning of § 1331, if a federal question appears on the face of

the complaint. First Affiliated, 813 F.2d at 1371. The court must determine the real nature of the claim regardless of Plaintiff's characterization. Id. at 1372.

Plaintiff seeds declaratory relief regarding his status under the Internal Revenue laws. He seeks injunctive relief enjoining the assessment and collection of federal income taxes. Plaintiff alleges violations of the United States Constitution and the Internal Revenue Code. This action might also be characterized as an action against federal employees in their personal capacity for alleged constitutional torts.

Plaintiff's complaint, on its face, appears to raise a federal question, and was properly removed to federal court. Therefore, Plaintiff's motion to quash removal (#7) should be denied.

**Proper Defendant**

The Defendants filed a motion to substituted the United States as the proper party Defendant (#4). Magistrate Judge Coffin granted the motion. Plaintiff moves to quash substitution of the United States as Defendant (#8) and to set aside the court's order granting the United States as Defendant (#11).

Plaintiff argues that the United States is not the proper party Defendant because he is not suing Carolyn Leonard and Paul Hoggatt in their official capacity, but in their individual capacity. Plaintiff alleges that the individual Defendants were acting outside

the scope of their office "When they sent me bootleg forms".[3] Plaintiff alleges that the individual Defendants "outside the scope of their office, sent their own personal forms...requesting information, labeling me as a taxpayer, and alleging I had taxable income."[4] The relief

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[3] pff alleges that the forms sent to him are "bootleg" forms because they do not contain an OMB number. However, a form does not have to contain an OMB number to be valid. United States v Saunders, 951 F.2d 1065 (9th Cir. 1991).

[4] 26 U.S.C. § 7701(a)(11)(B) defines the Secretary as the Secretary of the Treasury or his delegate. 26 U.S.C. § 6020 authorizes the Secretary to prepare an income tax return for any person who fails to make a return. 26 C.F.R. § 301.6020(2)(b) delegates this authority to prepare returns to the District Director or any authorized internal revenue agent or employee.

A taxpayer is defined as any person subject to any internal revenue tax. 26 U.S.C. § 7701(a)(14). To be a taxpayer does not necessarily mean that a person is actually liable for the tax; it is sufficient that he is potentially liable for it, even if it is ultimately determined that he owes no tax. Morse v United States, 494 F.2d 876, 880 (9th Cir. 1974). When returns are filed in a person's name declaring income, that person becomes a taxpayer. Id.

pff argues that under Botta v Scanlon, 288 F.2d 504 (2nd Cir. 1961), he is a nontaxpayer. In Botta, the court found that a nontaxpayer is a person who

Plaintiff seeks is: a judgment from the court declaring that for income tax purposes he has not engaged in taxable activities and is not subject to the payment of income tax or penalties; a judgment from the court declaring that he has not been self-employed and is not subject to the payment of self-employment taxes and penalties assessed for the years 1990 and 1991; an order from the court enjoining and restraining the Defendants from assessing taxes and penalties on his property; and reasonable fees, disbursements, and costs from this action.

An action against a federal employee personally is construed as an action against the United States, if the relief sought affects the actions of the Defendant in his capacity as a federal employee. Christensen v. Ward, 916 F.2d 1462, 1483 (10th Cir. 1990). It appears that this is an action brought against the individual employees of a United States agency, who have the statutory authority to collect revenue. See, Id. Plaintiff argues that the acts which violated his rights were done outside the scope of their employment.

There is a two-part test to determine whether an act is within the scope of an agent's employment. Yalkut v. Gemignani, 873 F.2d 31 (2nd Cir.

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paid someone else's taxes, and not their own. Id. at 507. Clearly in this case, pff is being assessed taxes on his own activities and income, and is not being held liable for the payment of a third party's taxes.

1989). First, the court must determine whether there is a reasonable connection between the act and the agent's duties and responsibilities. Id. at 34. Second, the court must determine whether the act is manifestly or palpably beyond the agent's authority. Id.

In this case the issuance of a notice of deficiency is related to Defendants' official duties. The Internal Revenue Code authorizes the determination of deficiencies, and the issuance of a notice of deficiency 26 U.S.C. § 6212.[5] The authority to determine a deficiency and issue a notice of deficiency has been delegated to the Defendants pursuant to 26 C.F.R. § 301.6212-1. The issuance of the notice of deficiency was not beyond the authority granted Defendants by the Internal Revenue Code and IRS regulations. Because the Defendants' actions were reasonably related to their official duties and not manifestly or palpably beyond their authority, the Defendants' actions were within the scope of their employment, and the United States is the proper Defendant.

The exercise of the power to overrule another judge is within the courts discretion. Castner v. First National Bank of Anchorage, 278 F.2d 376 (9th Cir. 1960). The discretion of the court should be used sparingly so as not to undermine the policy of finality.

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[5] Internal Revenue agents have the authority to assess and collect taxes. United States v. Tender, 787 F.2d 540 (10th Cir., 1986).

Moore, 682 F.2d at 834. "Where cogent reasons appear ... or exceptional circumstances exist, ... one judge may set aside or reverse a prior order made by a colleague." Id.

The law of the case should not be applied "woodenly when doing so would be inconsistent with considerations of substantial justice". Moore, 682 F.2d at 833-834. The "law of the case" rule ordinarily precludes a court from reexamining an issue previously decided by the same court, or a higher court, in the same case. Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982). The law of the case rule is analogous to res judicata. Id. Although, it does not bind the court as absolutely as res judicata. Id. The doctrine of the law of the case expresses the practice of courts generally to refuse to reopen questions formerly decided, but it is not limitation of their power. United States of America v. Maybusher, 735 F.2d 366, 370 (9th Cir. 1984), cert. den., 469 U.S. 1110 (1985).

Plaintiff has not provided the court with any "cogent reasons" or "exceptional circumstances" which would warrant overruling Judge Coffin's disposition of this motion.

Plaintiff's action could be construed as a Bivens claim against the individual Defendants. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), allows suits for damages against federal officials for federal constitutional violations. Bivens, 403 U.S. at 389, 395-396; See also, Gilbert v. DaGrossa,

756 F.2d 1455, 1459 (9th Cir. 1985). If the Plaintiff's action was construed as an action against the IRS in their individual capacity for acting in violation of their statutory duties under the Internal Revenue Code, thereby committing a constitutional tort against Plaintiff, his action would still be dismissed.

In order to bring a "Bivens" claim, Plaintiff must state a cause of action for a violation of a constitution right. See, Bivens, 403 U.S. at 397. Plaintiff argues that he is being deprived of "Life, Liberty and Property which are secured by the United States Constitution." (Plaintiff's response to United States Rule 12(b)(1) motions at 1). The Fifth Amendment of the Constitution provides in part that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . .".

If Plaintiff is bringing a claim for the denial of due process under the Fifth Amendment, Plaintiff must show that Defendants deprived him of liberty or property without due process. Plaintiff alleges that defendants wrongfully issued a deficiency notice and designated him as a taxpayer without a hearing regarding his status.

The Internal Revenue Code authorizes the Secretary to issue notices of deficiency. 26 U.S.C. § 6212. The Commissioner need not explain how the deficiency was determined. Urban v. Commissioner, 964 F.2d 888 (9th Cir. 1992). The notice of deficiency does not have to articulate the exact taxing

statute upon which the deficiency is based, or the factual basis for determining the deficiency. Geiselman v. United States, 961 F.2d 1, 4 (1st Cir. 1992). Failing to provide a taxpayer with an administrative fact finding hearing does not violate due process. Wilcox v. Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988) (citation omitted).

A Plaintiff can petition the tax court for a redetermination, and thereby discover the grounds for the deficiency. A notice of deficiency is a taxpayers' ticket to the tax court. Stoecklin v. Commissioner, 865 F.2d 1221, 1224 (11th Cir. 1989). The notice of deficiency clearly informs a person of their right to appeal to the Tax Court. Sciff v. United States, 919 F.2d 830 (2nd Cir. 1990), cert. denied, U.S. _____, 111 S.Ct. 1871 (1991). An appeal to the Tax Court provides a person with an opportunity to be heard and to contest the deficiency. Id. at 832. Once the Tax Court issues a decision, the plaintiff may appeal the Tax Court's decision to the District Court. See, Stoecklin v. Commissioner, 865 F.2d 1221 (11th Cir. 1989). The statutory scheme for contesting the Commissioner's deficiency determination comports with due process. Urban, 964 F.2d at 890.

A liberty interest is protected if the process allows an individual an opportunity to be heard on the allegations that an agent violated their constitutional rights. See, Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983). In 26 U.S.C. § 7433, Congress has explicitly provided the taxpayers with a remedy for wrongful acts

by officers or employees in connection with collecting taxes. Under this section, the taxpayer must comply with the procedural requirements of this section in order to bring suit. Plaintiff has not complied with the provisions of this section and has not exhausted his available administrative remedies.

Unless the taxpayer has filed a proper claim for a refund, a district court does not have jurisdiction to hear a refund claim. See, Boyd v. United States, 762 F.2d 1369 (9th Cir. 1985).

Based on the above, Plaintiff has failed to show that the issuance of a deficiency notice clearly violated established constitutional law. Therefore, Plaintiff would fail to state a claim upon which relief can be granted. See, Morales v. Haynes, 809 F.2d 708, 710 (5th Cir. 1989).

A complaint for damages based upon an alleged constitutional tort may be dismissed for failure to state a claim if Congress has provided an explicit remedy. Cameron v. Internal Revenue Service, 773 F.2d 126 (7th Cir. 1985). Congress has provided taxpayers with the right to bring a refund suit under 26 U.S.C. § 7433. Section 6343(b) specifically provides that a taxpayer can make a written request to the Secretary for return of property wrongfully levied upon. Congress also provided that erroneously collected taxes are to be refunded with interest. 26 U.S.C. §§ 6611, 6621, 6622. If a taxpayer brings a successful refund suit the Internal Revenue Code provides for the recovery of

attorney fees. 26 U.S.C. § 7430. 26 U.S.C. § 7433 is an explicit remedy provided by Congress. Since Congress has provided an explicit remedy for this alleged constitutional violation, Plaintiff's claim could be dismissed for failure to state a claim upon which relief could be granted.

26 U.S.C. §7426(D) Congress explicitly bars the type of suit Plaintiff attempts to bring. This section provides that "No action may be maintained against any ... officer or employee of the United States ... with respect to any acts for which an action could be maintained under this section." 26 U.S.C. § 7426. This is a clear statement from Congress that if the Internal Revenue Code provides a remedy, that remedy will be the taxpayer's sole remedy.

Based on the foregoing, Plaintiff's motion to quash substitution of the United States as Defendant (#8) and motion to set aside the court's order granting the United States as Defendant (#11) should be denied.

**Motion to Dismiss**

Defendants move to dismiss Plaintiff's complaint on the following grounds:

1) The United States has not waived its sovereign immunity, therefore, the court does not have subject matter jurisdiction;

2) Plaintiff's action is barred by the Anti-Injunction Act, 26 U.S.C. § 7421; and

3) Plaintiff's action is barred under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Federal courts require notice pleading. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that Plaintiff can plead no set of facts in support of a claim. California Dump Truck Owners Ass'n, Inc. v. Association of General Contractors of America, San Diego Chapter, Inc., 562 F.2d 607 (9th Cir. 1977). The court accepts plaintiff's material allegations in the complaint as true and construes them in the light most favorable to Plaintiff. Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989).

**Subject Matter Jurisdiction**

"It is well settled law that the United States, as a sovereign entity, may not be sued without its consent ...". Lehman v. Nakshian, 453 U.S. 156, 160 (1981). If sovereign immunity has not been waived, the case must be dismissed. See, Hutchinson v. United States, 677 F.2d 1322, 1327, (9th Cir. 1982). Plaintiff has the burden of establishing subject matter jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

Plaintiff does not oppose the government's claim of sovereign immunity. (Plaintiff's response to U.S. 12(b)(1) motion at 2). Plaintiff has not

demonstrated that the United States has waived sovereign immunity. Therefore, this case should be dismissed for lack of subject matter jurisdiction.

Anti-Injunction Act

Plaintiff seeks an order from the court enjoining and restraining the Defendants from assessing taxes and penalties on his property. Plaintiff's claim for relief is barred by the Anti-Injunction Act which states in part "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . .". 26 U.S.C. § 7421. The principal purpose of the statute is the protection of "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." Bob Jones University v. Simon, 416 U.S. 725, 736-737 (1974)(citations omitted).

The Anti-Injunction Act is inapplicable if under no circumstances could the government prevail and the Plaintiff can establish irreparable harm. Hughes v. United States, 953 F.2d 531 (9th Cir. 1992). In order to establish equitable grounds for injunctive relief, the Plaintiff must show that he has no adequate remedy at law, and that denial of injunctive relief would cause immediate irreparable harm. Jensen v. Internal Revenue Service, 835 F.2d 196 (9th Cir. 1987).

Plaintiff has failed to show that he does not have an adequate remedy at law.

Plaintiff could challenged the notice of deficiency by filing an action in tax court prior to paying the disputed amount or he could pay the disputed amount and seek a refund. See, Stonecipher v. Bray, 653 F.2d 398 (9th Cir. 1981). In addition, Plaintiff has failed to show how he will suffer irreparable harm without injunctive relief.

Plaintiff argues that his status as a nontaxpayer establishes that the government cannot prevail on the merits. As discussed above, Plaintiff does not have a right to an administrative fact finding hearing before the Internal Revenue Service determines a deficiency. See, Wilcox v. Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988). He must file an action in Tax Court challenging the deficiency or pay the tax and file a refund suit. Based on the foregoing, Plaintiff's action is barred by the Anti-Injunction Act.

**Declaratory Judgment Act**

28 U.S.C. § 2201(a) states in part "[i]n a case of actual controversy within its jurisdiction, except with respect to federal taxes other than actions brought under Section 7428 . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The Plaintiff seeks a judgment from the court declaring that: for income tax purposes he has not engaged in any taxable activity; he is not subject to the payment of income taxes or penalties for

1990 or 1991; he has not been self-employed; and he is not subject to self-employment tax or penalties. This type of relief is specifically barred by the language of the Declaratory Judgment Act. Alexander v. Americans United, Inc., 416 U.S. 752 (1974).

## RECOMMENDATION

Based on the foregoing, Plaintiff's motion to quash removal (#7), motion to quash substitution (#8) and motion to set aside the court's order (#11) should be denied. Plaintiff's motions for an order to show cause (#9) and for a stay of any further collection proceedings (#36) should be denied as moot. Defendant's motion to dismiss (#20) should be granted.

DATED this 9 day of July, 1994.

John P. Cooney
UNITED STATES MAGISTRATE JUDGE

DEPARTMENT OF THE TREASURY
UNITED STATES MINT
WASHINGTON, D.C. 20220

June 16, 1993

Mr. William R. Smith
4479 Corn Creek Rd.
Days Creek, OR 97429

Dear Mr. Smith:

Thank you for your letter requesting information about U.S. gold coins, which recently was forwarded to my office for reply.

The United States mint is authorized by Public Law 99-185 to produce the American Eagle Gold Bullion Coins, and by the authorizing legislation for each specific commemorative coin issue.

The face value of the gold bullion coins also was determined by Public Law 99-185, which authorized the Mint to produce the one-ounce coins with a face value of $50; one-half ounce coins with a face value of $25; one-fourth ounce coins with a face value of $10; and one-tenth ounce coins with a face value of $5. Legislative history does not indicate why Congress chose the specific face values for the bullion coins.

The American Eagle Gold Bullion Coins are legal tender at their face value.

Enclosed you will find some information about the American Eagle Gold Bullion Coins, some general information about U.S. coins, and a copy of the authorizing legislation for the American Eagle Gold Bullion Coins and the World War II 50th Anniversary Commemorative Coins.

I hope you find this information useful and thank you for your interest in the U.S. Mint.

Sincerely,

Michael J. White
Public Information Office

Enclosures

1989 & 90

I, Pacific Timber Corporation paid in legal tender gold coin to William Smith 3,900.00 for 118,000 board feet of timber.

Mike Monteleone
Pres. Pacific Timber Corp.